

**Town of Kinderhook
Zoning Board of Appeals
August 1, 2013**

Minutes

Approved

The Meeting of the Town of Kinderhook Zoning Board of Appeals was held on Thursday, August 1, 2013 beginning at 7:00 pm at the Kinderhook Town Hall, 4 Church Street, Niverville, NY with Chairman John McManus presiding. The meeting was called to order by the Chairman and the Roll was taken by the Acting Secretary, Kim Pinkowski.

1. Call Roll

Present:

John McManus, Chairman
Andrew Howard, Town Attorney
Peter Bujanow
Keith St. John
Greg Allen
Regina Rose
Kim Pinkowski, Acting Secretary

Excused:

Nataly Dee, Secretary

Absent:

None

Mr. McManus welcomed Regina Rose to the Board. He also thanked Kim Pinkowski for standing in as Secretary.

B. Correspondence

1. Review of Minutes
July 27, 2013

A motion to approve the Minutes from the July 27, 2013 Meeting was made by Mr. Allen. Motion seconded by Mr. Bujanow. All those in attendance at that meeting voted in favor, Ms. Rose abstained; motion carried. Minutes approved.

Public Hearing(s):

1. Peter Defiglio – Area Variance – 56 Hawley Road, Niverville.

The Notice as it appeared in the newspaper of record was read by Mrs. Pinkowski.

A Motion to re-open the Public Hearing was made by Mr. Allen. Motion seconded by Ms. Rose. All in favor; motion carried. Hearing re-opened.

Mr. Christopher Muller, Esq., counsel for the applicant Peter Defiglio, addressed the Board. Mr. Muller referenced a letter dated July 1, 2013, submitted to the Board requesting materials related to Mr. Defiglio's application in addition to materials regarding previous area variances, including minutes, applications, and relevant correspondence. He stated that he had received minutes related

**Town of Kinderhook
Zoning Board of Appeals
August 1, 2013**

Minutes

Approved

to his client's application as well as previous minutes related to other area variances. Additionally, he requested copies of prior applications which he noted he did not receive. Mr. Muller noted that without the actual applications it was difficult to determine from the minutes what the actual sizes and dimensions of the area variances were.

Mr. McManus addressed the issue of previous applications by inquiring about the retention period of such materials. Mrs. Pinkowski replied that certainly minutes are retained permanently, and thought the same for additional materials, including applications. She also noted that the Building Department would also have a record of decisions. These materials would be available to the applicant upon the return of the Secretary. Mr. McManus offered that if the applicant made a list of specific materials or applications it would make the task easier. Mr. McManus asked Mr. Muller if he would like to continue with the proceedings or would he prefer to wait until next month during which the requested materials would be provided. After conferring with his client, Mr. Muller opted to continue with the proceedings.

Mr. Muller inquired as to the number of notices that were sent to neighbors. While the number was unknown at the time, Mr. Muller wanted the record to reflect that no neighbors were in attendance at this meeting, nor was anyone in attendance at the previous hearing. (For the record, eleven letters were sent to the neighbors prior to both of the Public Hearing dates. No one was in attendance at the first Public Hearing, nor did anyone contact the secretary prior to the hearing for further information or to express an opinion about the matter. None of the neighbors attended the second hearing, nor were any calls received by the secretary from the neighbors prior to the second hearing. A letter in support of the proposal was received from Mr. VanEck of 5 Sanders Lane (on file)).

Mr. Muller asked the Board if they had a preference about how he proceeded. As they did not, Mr. Muller began by questioning the applicant. He started by asking the applicant basic information about himself and the property. He then moved on to specific questions regarding his application. Specifics regarding the size of the proposed shed were addressed. Mr. Defiglio stated that he scaled down the size of the structure from his initial application. As the application currently stands before the Board, the dimensions of the proposed structure are 24' x 20'. The proposed height is currently 6 on 12 trusses. This reflects a reduction in the height from what was previous proposed. Mr. Defiglio explained the reasoning for these changes. This was also put into the context of other structures along the road. The proposed location of the shed on the property was addressed. Mr. Muller began to submit photographic evidence in the property, providing details about each exhibit submitted (all exhibits are on file). Exhibit 1 was submitted which provides engineering details about the proposed trusses. An explanation of the plan was provided. The roof is to be metal as is consistent with the material and color of the roof of the house. Exhibit 2 was introduced which shows the four corners of the proposed shed. The picture is shown from the vantage of the deck of the house. The back side of the shed will border the neighbor's home on Hawley Road. Further detail was provided regarding what would border the proposed shed on each of its sides. Exhibit 3 was introduced which shows the proposed location from the vantage of Sanders Lane side of the property. Exhibit 4 is a picture taken from the rear of the proposed shed toward the neighbor's property. The stakes shown in the photograph represent the location of the

**Town of Kinderhook
Zoning Board of Appeals
August 1, 2013**

Minutes

Approved

rear of the shed. The distance from the fence to the rear stakes is 6'. Exhibit 5 is a picture showing a scaled perspective in of the distance from the line of the proposed shed to the property line. Exhibit 6 was submitted showing the bushes on the property line with the neighbor on Sanders Lane in relation to the proposed shed. The applicant stated that the only place the shed could be placed is in the proposed location due to the location of the drywell, the house, the driveway, and the slope of the yard. There is no other place that the shed could be reasonably placed. The proposed distance from the back of the proposed structure and the fence is roughly 6'. The right side of the proposed structure is 7' from the feet. Mr. Defiglio stated that he would be building the proposed structure himself. Mr. Muller inquired about his experience with building. Mr. Defiglio stated that he has building experience and has worked in the construction industry his entire adult life; he is currently a superintendent for a construction company. Further, he stated that the style of the proposed structure would match that of his house in appearance. Mr. Muller asked if he had spoken with his neighbors with respect of the proposal. Mr. Defiglio stated that he had on a number of occasions discussed the matter with his adjacent neighbors as well as many other residents in the neighborhood. They have never expressed any objections and are in favor of his proposal. Exhibit 7 was submitted which is a letter from an adjoining neighbor, John VanEck of 5 Sanders Lane, stating that he has no objections to the proposed structure in the proposed location. Mr. Defiglio indicated that many of the properties in the neighborhood have sheds and garages that are similar in size to that proposed by the applicant. Mr. Muller asked the applicant how long he has been planning to build a shed. Mr. Defiglio stated that he has been thinking about it for some time. He has accumulated tools and equipment over time and now he has the resources to build the structure. He is concerned about caring for his possessions as well as the safety of his equipment. With regard to what he proposes to store in the shed, Mr. Defiglio indicated that he thought ladders, deck charger, jet ski, trailer, golf cart, miscellaneous item, tools that require gas, garbage cans, etc. He also stated that his house is within 200 yards of Kinderhook Lake. He uses the lake for recreation and his deed includes 6' of frontage for a dock. Mr. Muller inquired about improvements, if any, he has made to the house since he's owned it. Mr. Defiglio indicated that he has renovated the interior, replaced the exterior siding, replaced the roof, placed stone around the foundation, and improved the chimney.

The following exhibits were submitted as supporting documentation regarding prior area variances granted by the Zoning Board of Appeals. A number of exhibits were submitted which consist of photographs taken from the neighborhood depicting properties which have previously applied to the ZBA and were granted area variances (on file). Exhibit 8 was submitted which is photograph showing items located in the yard of 85 Kinderhook Ave. The property indicated is that of Breen who previously submitted an application to the ZBA, and was granted an area variance for a pool in the yard. Exhibit 9 submitted shows a garage at 34 Kinderhook Ave. The structure is apparently closer to the road than that which is being proposed by the current applicant. The homeowner is Balfort, and came before the Board in 1996 and was granted a 20' side yard setback variance. Exhibit 10 shows 82 Concourse Blvd owner, owner of record is Clark. This picture shows the pitch of the roof of the shed on that property. Discussion of how the pitch of the roof compares to the proposed structure. In this case the applicant was granted a 10' side yard variance in 2002. Exhibit 11 depicts a house at 88 Concourse with a boat trailer that is nearly in the road. The house appears to be 12' from the road and the boat trailer 6' from the road. Exhibit 13 shows 116 Concourse,

**Town of Kinderhook
Zoning Board of Appeals
August 1, 2013**

Minutes

Approved

owner of record is Price, the front door appears to be 8 feet from the road. An area variance was granted in 1998 to build a 10x10 entryway depicted on the photo. Exhibit 12 shows a large garage at 26 Concourse. How does it compare to the proposed structure? It is a taller and a larger structure which is closer to the road than what Mr. Defiglio is proposing. Mr. St. John asked about the significance of Exhibit 12. Mr. Muller responded that it is a comparable property in the neighborhood which has a larger and higher structure that exists in the neighborhood. It was not known when the structure was built or whether it had received an area variance from the ZBA. Exhibit 14 was submitted which shows the layout of Mr. Defiglio's property. It shows the location of the house, deck, dry well, septic and well. The reverse side of the exhibit shows the lot size as indicated by the Tax Map. The dimensions of the lot are listed as 85' wide from the Sanders Lane side of the property and 101.1' long from the Hawley Road side of the property. Mr. Defiglio stated that when he compared these measurements to actual measurements that he took with a measuring wheel they are actually less than those listed, indicating that he has less area than is stated in the exhibit.

At this time, Mr. Muller did not have any additional questions for Mr. Defiglio. A discussion of prior area variances and their decisions ensued. Mr. Howard explained that with regard to these variances the applicant has the ability to provide more discussion about them, but in terms of the action on this it is not the applicants burden to show that prior variances were granted, it is the Board's burden to show that the prior granted variances by this Board are somewhat distinguished in the case should they decide not to grant the variance. The burden does not rest with the applicant, it rests with the Board. Mr. McManus asked Mr. Howard to expand on the issue in regard to the precedential value of the Town of Kinderhook Zoning Board of Appeals grants or denial of area variances. Certainly they are relevant, but that does not mean that the Board's hands are tied. It means they need to look at the circumstances surrounding each application. Logically, what courts have held is that boards must adhere to their own precedents unless they provide a rational explanation for reaching a different result based on similar facts. What courts have found is that where a decision of a ZBA appears to be inconsistent with prior decisions, failure of a ZBA to identify any evidence which distinguishes the denial of variance when similar variances are routinely granted indicates arbitrary action. While those prior cases are relevant, they aren't necessarily determinative. Mr. McManus inquired of Mr. Muller his position on whether or not Mr. Defiglio's lot is an existing undersized lot according to the Code. Mr. Muller replied that he was of the position that it is an undersized lot. He feels this is very significant factor. He noted that many of the prior variances described lots as undersized, or having a unique characteristic, noting such things as odd shaped lots, difficult terrain, and non-conforming lots. Further, Mr. Muller noted that Mr. Defiglio, in measuring the property, if he met the actual set-backs required in the Code for a structure like this, it would place the structure within the bounds of his home. Mr. McManus noted that in the case of an undersized lot the requirements for set-back are altered. For an undersized lot the requirements for a side yard set-back are not less than 8', in the rear not less than 25'. In this case that would put the requested side yard variance at 2' and the rear yard variance at 18'. Mr. McManus noted Chapter 250-46 of the Code. According to the Code from a square footage perspective based on the dimensions of the lot it does appear to meet the definition of an undersized lot.

**Town of Kinderhook
Zoning Board of Appeals
August 1, 2013**

Minutes

Approved

Mr. McManus offered that Mr. Muller could at this time present any closing remarks in the event that he would like to have the Public Hearing closed so that the Board could then proceed with their deliberations. He also offered the option of having the Public Hearing remain open pending further review of the records. Mr. Muller conferred with his client. Mr. Muller stated that they would like to move forward. At this point, Mr. McManus opened the floor to questions from the Board.

Mr. St. John asked if the applicant had any photographs that more comprehensively or more broadly depict the appearance of yards with more than one structure. No photos of that sort were taken as it was felt they would not demonstrate the entire property. Mr. St. John clarified his request by asking for the outline of the proposed structure relative to the other structures on the property, not in isolation of the other structures. Mr. Muller offered that the only way to adequately show that perspective a photo would have to be taken from the rear of the property with the house shown in the background. An elevated vantage would also be necessary to make the requested vantage point possible. Mr. Bujanow commented that he thought the photo that makes the biggest impact on the property is the one taken from right outside the driveway. Further, he noted that when he observed it there were some vehicles in the driveway, and when you look at the deck, and you can see the back buildings, and you can see where the proposed structure is, it really shows how compact that area is. Mr. Bujanow asked about the dimensions of the house. He said when you look at the footprint of the house on the undersized lot, and then consider another structure, it really gets tight. It becomes a very compact site in his opinion. Exact dimensions of the house were not available. Mr. Bujanow stated that without a schematic that is to scale makes the proposal a little difficult. He wanted to know what the total area of the lot was covered by buildings and decks. Mr. Muller interjected that he would like to know what other applicants were required to submit, and if prior applications contained site plans with elevations. Mr. Allen noted that it seemed that one could almost get the house dimensions by overlaying the tax map with the dimensions of setback provided to get a sense of the lot coverage. At this point, Mr. Howard reminded the Board that there is a standard that is supposed to be applied. There are five factors that need to be addressed.

Mr. Bujanow again questioned the dimensions of the existing structure and deck expressing frustration that those were not provided. Additionally, the height of the proposed structure was requested, and while the diagram of the proposed trusses noted the roof at 20' wide, he could not determine the height of the truss from the tip of the truss to the bottom of the truss was. He asked for clarification about the dimensions (3-7-15) noted on the plans. Mr. Defiglio clarified that the walls are now proposed to be 9' high down from 10' in the earlier proposal. He attempted to clarify the technical details of the structure. Mr. Bujanow addressed the Board with the factor of the substantial nature of the structure and the impact on the neighborhood. Further, he stated that what he was trying to ascertain from the discussion of the significance of the footprint to determine whether it is substantial in terms of the coverage on the lot. A point of concern is the substantial element of the five factors test. Mr. Muller stated that with respect to the height, Mr. Defiglio testified that it is comparable, and perhaps lower, than the neighbors, furthermore adding that the relevance as well as height goes Hawley Road is elevated, the garage will be lower at its base than Hawley which will decrease the height even more making the height comparable to the neighbors to present no higher obstruction than what is currently in the neighborhood. He noted the concerns

**Town of Kinderhook
Zoning Board of Appeals
August 1, 2013**

Minutes

Approved

and reasoned that that is why multiple modifications have been made. Ms. Rose asked for clarification about the process that brings an application for area variance to the ZBA. Further, she sought clarification that the Board's duty is to compare the five factors. She noted that some of this seems to be subjective. Mr. Howard explained that rather than being subjective, it is the exercise of the Board's discretion, and the Board needs to consider the evidence submitted by the applicant, consider any statements, in favor or against, from the neighbors because those are not subjective pieces of evidence.

Mr. McManus asked if there were any further questions. He allowed Mr. Muller the opportunity to provide closing statements.

Mr. Muller thanked the Board for their time and appreciated their consideration of all the evidence that was presented. Mr. Defiglio has been a long time resident of the neighborhood; he's invested in the neighborhood and has raised his family there. He noted that it is a lakefront community, and the uses of his property are entirely consistent with lakefront property ownership. The property that he has acquired, and the (items) that he seeks to store, and the benefit that he will gain from this structure go directly towards lakefront ownership, which he submits is something that the Town and the community want to promote. Kinderhook Lake has been revitalized; is a vibrant area. People in the area use the lake and take care of the lake. Mr. Defiglio's property includes a deed to part of the dock. With that, the community must accept and understand that there will be equipment related to lake use that needs proper protection from weather, vandalism, and potential liability. So, the things that Mr. Defiglio seeks to protect, his own possessions, are consistent with people who live in this neighborhood. Secondly, he seeks to protect his work property, the things that allow him to contribute to our community, to support his family, and to improve his home. He has testified that he has continued to his home. He's improved the outside of his home, and he wants to improve the way the property looks. There has been much debate about whether this structure will occupy too much space on the property. Two options are submitted: there is the option of having a structure, which is built by a professional builder, that is similar to the home, meets the character of the home and the neighborhood; or, there's a choice to have property with items strewn about the lawn with possible liability. He wants to store gasoline and items that use gasoline away from his home, and this structure will allow him to do that. It will be a massive benefit to Mr. Defiglio as well as the neighborhood. You want people to retain ownership in homes; you want people to continue to live there and not be forced to move because they are not able to provide adequate security and safety and storage for their property and possessions. Mr. Defiglio is trying to do that, and that is why he is before this Board. As he stated, he has owned this house since he was in his twenties, and he is finally able financially to do this. In regards to any undesirable change to the neighborhood, He is certainly sensitive to and concerned with whether the structure would make the property look too compact. If you look at some of the pictures submitted, there are homes in the neighborhood which sit directly on the road, feet from the road where cars go by day in and day out. Some of the factors seen in prior applications talk about safety concerns. Mr. Defiglio proposes to put the structure in the place where it is furthest away from the street. It will not cause traffic problems. Who are the people most impacted by this structure, certainly the adjacent neighbors, Darrel Lafferty and John Van Eck, who submitted a letter to the Board in favor of the proposal. In his letter he indicated that he is aware of the size and placement

**Town of Kinderhook
Zoning Board of Appeals
August 1, 2013**

Minutes

Approved

of the structure. The structure would not impede views of the lake; it would not impede use of the road. It is in the most sensible place possible. Additionally, addressing the factor of self-created hardship, he submits that this is not self-created any more than the use and needs of anyone else who owns home and is in the relative age of Mr. Defiglio in this Kinderhook area location. Certainly, the totality of those circumstances in deciding whether it's self-created, the other side is don't own anything; and we don't want to promote people not owning possessions and using the lake. With regard to the substantialness of the variance, the totality of the circumstance to determine the whether it's substantial, as noted before, the set back that would be required to the back of the structure (side set back), is not substantial. It's arguable, that in fact, no variance at all was needed for that set back. The set back that is of most issue is that on the side of the property adjoining Mr. Van Eck's property. The photos have demonstrated that there is sufficient room there. The man most impact by it, more than anybody in this room, has said it's fine and he has no objection to it. What Mr. Muller would ask, certainly, that based on, what he would term a favorable voting record in the past from the Board. He noted that of the prior variances reviewed there were very few negative votes. He submitted that Mr. Defiglio's request should be granted. This Board should follow the Planning Board's advisory opinion and grant the request based on the numerous modifications that have been made to meet the concerns of the Board.

Mr. McManus thanked Mr. Muller for his presentation and entertained a motion to close the Public Hearing. A motion to close the Public Hearing was made by Mr. Allen. Motion seconded by Ms. Rose. All in favor, none opposed. Motion carried; Hearing closed.

Mr. McManus addressed the five factors set out in the Code. While not all five need to be met, all factors are considered together and weighed at the Board's discretion in order to make a determination as to whether or not the evidence that has been presented supports the granting of an area variance. The first is whether an undesirable change will be produced to the character of the neighborhood, or a detriment to the nearby properties, would be created by the granting of the area variance. In Mr. McManus' view, the Board has heard and seen quite a bit of evidence that shows that granting this area variance for the construction of a shed would not result in an undesirable change in the character of the neighborhood; in fact, the construction of the shed is entirely aligned with the character of the neighborhood. It is a hamlet area; most of the lots are fairly small or undersized. There are a lot of homes with sheds like this. The second factor is whether the benefit sought by the applicant can be achieved by some method feasible to the applicant's pursuit other than an area variance. He felt that the Board had heard that, short of not building the shed at all, that is simply not the case. The building of a smaller shed would not meet the applicant's needs. Mr. McManus reviewed the features of the property as presented on the schematic provided. It appears the shed is sited on the one and only place that it could be built. Whether the requested area variance is substantial is the third factor. Here, there is a little uncertainty on the side variance request because the exact property line is not known. What is requested in the application is 6' on the side, the Code requires for an undersized lot requires 8', so the applicant is only looking for two feet which Mr. McManus did not consider substantial. The 7' off the required 25' in the back is fairly substantial. The fourth factor is whether the proposed variance will have an adverse effect or impact on the physical or environmental conditions of the neighborhood or district. His opinion is no for the same reasons mentioned in regard to the first factor. The fifth factor addressed whether

**Town of Kinderhook
Zoning Board of Appeals
August 1, 2013**

Minutes

Approved

the alleged difficulty is self-created. In Mr. McManus' opinion it is by virtue of the property that he owns and what he wants to do. But, as it says explicitly in the Kinderhook Town Code that does not necessarily preclude the granting of the area variance. Turning to the precedent, the decisions that were compiled by the secretary there are quite a few that are fairly analogous where area variances were granted. For the purposes of the record, Mr. McManus noted some of the previously granted area variances: Klugo (2002), Gaylord (2004), Clark (2002), Funk (2001), Schaffer (2001), Price (1998), Bovak (1997), Gettys (1995). Mr. McManus reviewed the details of some of these applications to demonstrate their similarity. Mr. McManus stated that while he does not feel bound by these decisions, he recognized that for the Board to not make an arbitrary decision by a review of the court, they would need to distinguish the other grants for area variances, in his opinion, a decision like Klugo's is essentially indistinguishable from what has been presented. Further, when he weighs all five of the factors and balances them, he believes the applicant has satisfied the criteria for an area variance, and would vote in favor of granting it. He then opened it up to the Board for discussion. Mr. St. John asked of the several variance applications that apparently previous Boards have approved, the assumption offered was that they were analogous, but he did not hear any information that would make those prior applications consistent with the circumstances concerning the specifics with respect to the application before the Board today, in terms of undersized lot, existing other structures on the property. Even going to the Klugo decision as perhaps the strongest precedent for this Board to consider, he might suggest that the facts are distinguishable given the differences in intensity of development as proposed by this application versus the application that the prior Board approved. This applicant's property in a hamlet zone as versus the Klugo decision which is not in a hamlet zone, nor was it an undersized lot. Second, the cases that were cited don't necessarily present the same or similar circumstances that would fair in comparison. Mr. St. John was of the opinion that the applicant has been forthright in his reluctance to further reduce the size of the structure. He did agree with the 3rd factor regarding the substantial nature of the variance indicating that the rear variance is substantial. Further, he did not feel that the proposed structure would have an adverse effect or impact on the neighborhood, but he did feel that difficulty is self-created. Regarding the prior decisions, he felt that those decisions have been made on applications that are very different from the one before this Board, noting that just because an applicant has asked for an area variance, doesn't mean that application with respect to a garage or an entryway is the same as or similar to an area variance application concerning the construction of an entirely new and separate and detached structure. Mr. Bujanow stated that he supports what Mr. St. John has stated. He does consider it the set back on the one piece as substantial. Further, he felt the benefit the applicant is seeking can be achieved by a smaller building. He has difficulty approving the application with the building size that the applicant has proposed. Mr. Muller inquired what dimensions would be submitted that would be approved. Mr. Bujanow could not provide specific measurements, but stated that something that fits better on that lot and meets the setbacks required. He was of the opinion that a 20'x24' structure that is 18' high is not a shed, noting that some houses are that size. Ms. Rose stated that she has no objections, noting that she understands what the other board members have stated regarding the size of the building. If there is nothing in the Code that tells us how big a structure can be than it is our opinion about whether it is too crowded. She felt that it is the choice of the owner if he wants to give up all that yard space; and the choice of the next buyer if they want to buy a lot that has so much construction on it. The neighbors are not objecting.

**Town of Kinderhook
Zoning Board of Appeals
August 1, 2013**

Minutes

Approved

Mr. McManus entertained a motion to approve the area variance of 6 feet on the side of the property and 7 feet on the rear of the property. Mr. Allen made the motion as proposed. Motion seconded by Ms. Rose. The vote was as follows:

In Favor:

Mr. McManus
Mr. Allen
Ms Rose

Opposed:

Mr. Bujanow
Mr. St. John

Vote is 3-2. Motion carried. Area variance approved.

No SEQR Review is required.

New Business:

None

Old Business:

None

Other:

1. Liaisons:

Not in attendance.

2. Public Comments:

None

A Motion to adjourn was made by Mr. Allen. Motion seconded by Mr. Bujanow. All in favor. Motion carried; meeting adjourned at 9:26pm.

Respectfully submitted,

Nataly Dee, Secretary